Motion to Dismiss

Office - Supreme Court, U.S.
FILED
SEP 30 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-2225

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

COLUMBIA GAS TRANSMISSION CORPORATION
Appellant,

v.

HERSCHEL H. ROSE III,
Tax Commissioner Of West Virginia,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

Of Counsel

CHAUNCEY H. BROWNING
Attorney General

JACK C. McCLUNG
Deputy Attorney General

E. WAYNE BASCONI
Assistant Attorney General

State Capitol
Charleston, West Virginia
25305

ROBERT P. HOWELL
Assistant Attorney General
for the State of West Virginia
State Capitol, W-435
Charleston, West Virginia 25305
(304) 348-2522

Counsel for Appellee
Herschel H. Rose III

QUESTIONS PRESENTED

Appellee disagrees with appellant's presentation of the Questions Presented in this appeal and herewith presents a more accurate statement of the questions presented the Court:

1. Whether the imposition of the West Virginia business and occupation tax upon appellant's business activity of making wholesale sales of natural gas in West Virginia is fairly apportioned and thus constitutional.

2. Whether the imposition of the West Virginia business and occupation tax upon appellant's business activity of making wholesale sales of natural gas in West Virginia discriminates against interstate commerce.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
ARGUMENT	
I. THE IMPOSTION OF THE WEST VIRGINIA BUSINESS AND OCCUPATION TAX UPON APPELLANT'S BUSINESS ACTIVITY OF MAKING WHOLESALE SALES OF NATURAL GAS IN WEST VIRGINIA IS FAIRLY APPORTIONED AND THUS CONSTITUTIONAL	5
II. THE IMPOSITION OF THE WEST VIRGINIA BUSINESS AND OCCUPATION TAX UPON APPELLANT'S BUSINESS ACTIVITY OF MAKING WHOLESALE SALES OF NATURAL GAS IN WEST VIRGINIA DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE	12
CONCLUSION	19

TABLE OF AUTHORITIES

Cases:	Page
Alaska v. Arctic Maid, 366 U.S. 199, 6 L. Ed. 2d 227, 81 S. Ct. 929 (1961);	15, 16,
Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 329, 50 L. Ed. 2d 514, 97 S. Ct. 599 (1977);	13
Caskey Baking Co. v. Virginia, 313 U.S. 117, 85 L. Ed. 2d 1223, 61 S. Ct. 881 (1941);	14, 15 19
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977);	7
Department of Revenue of Washington v. Association of Washington Stevedoring Companies, 435 U.S. 734, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978);	9
General Motors Corp. v. Washington, 377 U.S. 436, 12 L. Ed. 2d 430, 85 S. Ct. 14 (1964);	8, 9, 10 11
Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 411, 81 L. Ed. 1193, 57 S. Ct. 772 (1937);	8

Page

Gregg Dyeing Co. v. Query, 286 U.S. 472, 76 L. Ed. 1232, 52 S. Ct. 631 (1932); 16

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 10 L. Ed. 2d 202, 83 S. Ct. 1201 (1963); 13

Henneford v. Silas Mason Co., 300 U.S. 577, 587, 81 L. Ed. 814, 57 S. Ct. 524 (1937); 18

Maryland v. Louisiana, 451 U.S. 725, 755, 68 L. Ed. 2d 576, 101 S. Ct. 2114 n.27 (1981); 9, 13,

Moorman Manufacturing Company v. Bair, 437 U.S. 267, 57 L. Ed. 2d 197, 98 S. Ct. 2340 (1978); 9, 10

Standard Pressed Steel v. Washington Department of Revenue, 419 U.S. 560, 42 L. Ed. 2d 719, 95 S. Ct. 706 (1975); 8, 9, 10

Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 82 L. Ed. 823, 58 S. Ct. 546 (1937); 7, 8

Wisconsin v. J. C. Penney Co., 311 U.S. 435, 85 L. Ed. 267, 61 S. Ct. 246 (1940). 8

Page

Statutes:

West Virginia Code of 1931, as amended, Chapter 11, Article 13, Section 1; 6

West Virginia Code of 1931, as amended, Chapter 11, Article 13, Section 2; 6, 12

West Virginia Code of 1931, as amended, Chapter 11, Article 13, Section 2a, Page 22, n.1; 12

West Virginia Code of 1931, as amended, Chapter 11, Article 13, Section 2b; 18

West Virginia Code of 1931, as amended, Chapter 11, Article 13, Section 2c. 6, 12

NO. 81-2225

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

COLUMBIA GAS TRANSMISSION CORPORATION,

Appellant,

v.

HERSCHEL H. ROSE III,
TAX COMMISSIONER OF WEST VIRGINIA,

Appellee,

ON APPEAL FROM THE SUPREME COURT OF
APPEALS OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

This appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Circuit Court of Kanawha County, West Virginia,

on the grounds that this appeal does not present a substantial federal question, that the judgment below rests on an adequate nonfederal basis, and on other grounds which this appellee will present herein which establish that the Court should not set this case for argument.

OPINION BELOW

The March 2, 1981 letter, opinion of the Circuit Court of Kanawha County, West Virginia, and the Circuit Court's judgment order of April 24, 1981, are printed in the Appendix, appended to appellant's jurisdictional statement.

JURISDICTION

The proceeding below began with an assessment of tax under the West Virginia business and occupation tax, Chapter 11, Article 13, of the West Virginia Code of 1931, as amended. The assessment was upheld as modified by the Tax Commissioner of West Virginia upon evidence taken at administrative hearings. Upon timely appeal to the Circuit Court of Kanawha County, the Tax Commissioner's decision was affirmed and judgment rendered against the appellant.

Appellant sought an appeal from the Circuit Court's decision in the West Virginia Supreme Court of Appeals and was thrice refused. The appellant then filed a notice of appeal to this Court with the West Virginia Supreme Court of Appeals and the Circuit Court of Kanawha County, West Virginia, on June 3, 1982. The asserted jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. § 1257 (2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 1, § 8, of the United States Constitution, the Commerce Clause, and the pertinent West Virginia statutes are set forth in the Appendix, appended to appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

The facts of this case are set forth in the Tax Commissioner's administrative decision (Appendix, appended to Appellant's Jurisdictional Statement, A. at 33a). Facts pertinent to this appeal are as follows:

Appellant made wholesale sales of natural gas to both affiliated and nonaffiliated companies. The assessment of business and occupation tax is upon wholesale sales of natural gas made by the appellant to its customers in the State of West Virginia. The actual production of the natural gas, whether by appellant or another, the acquisition of the gas by appellant, when produced by another, the resale of the gas by appellant's customer and the actual comsumption of the gas could and did take place either within or without the State of West Virginia. (A. at 37a.)

It is undisputed that the wholesale sales took place in West Virginia between separate legal entities. (A. at 42a.) The activities taxed all occurred in West Virginia. (A. at 44a.) Appellant failed to demonstrate that the gross receipts derived from the wholesale sales of natural gas in West Virginia were subject to tax by any state other than West Virginia. (A. at 50a.)

During the years covered by the audit, appellant failed to report its gross income derived from its wholesale sales of natural gas in West Virginia. Ap-

pellant characterizes such sales as being in interstate commerce. The Tax Commissioner of West Virginia determined, pursuant to such audit, that the gross income from the sales of natural gas by appellant in West Virginia was properly subject to the business and occupation tax.

The assessment of tax was made against appellant in 1977 for business and occupation tax for the years 1970 through 1974, and the assessment was upheld, as modified, by the Tax Commissioner of West Virginia, in his administrative decision dated June 29, 1979. Appellant appealed the Tax Commissioner's administrative decision to the Circuit Court of Kanawha County, West Virginia, where the decision was affirmed.

The Circuit Court of Kanawha County held that the tax could be imposed upon appellant's gross income from the sale of natural gas in West Virginia and that the taxing statute did not require a value-added tax as proposed by the taxpayer. The Court further held that a distinction is to be made between the subject and the measure of the tax. The Court found the subject of the business and occupation tax to be the privilege of conducting a particular business activity.

Appellant sought an appeal from such decision in the West Virginia Supreme Court of Appeals which was refused on three occasions.

ARGUMENT

I.

THE IMPOSITION OF THE WEST VIRGINIA BUSINESS AND OCCUPATION TAX UPON APPELLANT'S BUSINESS ACTIVITY OF MAKING WHOLESALE SALES OF NATURAL GAS IN WEST VIRGINIA IS FAIRLY APPORTIONED AND THUS CONSTITUTIONAL.

The West Virginia business and occupation tax is a fairly apportioned tax because the local activities of the taxpayer provide not only the tax nexus, but also form the boundary of the tax incident.

Appellant argues that the application of the business and occupation tax upon its gross income is " unreasonably malapportioned." Such position ignores the tax structure of West Virginia which imposes a business and occupation tax, a gross receipts tax, upon certain business activities, i.e., making of wholesale sales, the measure of the tax being the gross proceeds derived from the sale.

The privilege which West Virginia seeks to tax is that of "engaging or continuing within this State * * * in the business of selling at wholesale."

Chapter 11, Article 13, Section 2c, of the West Virginia Code of 1931, as amended. (A. at 74a and 75a.) The tax is imposed by Chapter 11, Article 13, Section 2, of the West Virginia Code of 1931, as amended, upon the "gross income" derived from such activity. (A. at 69a.) "Gross income" is defined as being "the gross receipts of the taxpayer." Chapter 11, Article 13, Section 1, of the West Virginia Code of 1931, as amended. (A. at 65a.)

West Virginia is not seeking to tax production or transportation activities occurring in states other than West Virginia. Other states do not tax the wholesale sales activity of appellant carried on wholly within West Virginia. Gross receipts from sales made in other states are not included in the measure of the tax. The value of the natural gas sold by appellant in West Virginia, the gross proceeds received by appellant from the sale thereof, is merely the measure of the tax which is imposed on exclusively in-State wholesale sales activities.

The lower court recognized the holding of this Court in **Complete Auto Transit, Inc. v. Brady**, 430 U.S. 274, (1977) as requiring an inquiry into the practical "economic consequences" of a tax to determine its constitutionality. However, the lower court refused to transform the gross receipts tax into a value-added tax. As stated in its letter opinion:

> "Despite **Complete Auto Transit's** general emphasis on economic consequences as opposed to statutory labels, the case does not require a value-added tax like that proposed by the taxpayer in lieu of an activity/gross receipts tax like the West Virginia business and occupation tax. **Complete Auto Transit** does not

> obliterate the distinction between the subject of a tax and its measure (base). Stated another way, the **nature** of the tax actually formulated by the state is still important and may not be ignored in favor of economic theory, especially, where, as here, that theory (the value-added tax) has been expressly rejected by the state's fiscal policy-formulators. The subject of the business and occupation tax is the privilege of conducting a particular classification of business within this state, here, the business of wholesale sales. The base portion of the measure of the tax for this classification is 'gross income' defined in section 1 of the statute to include 'gross receipts of the taxpayer derived from * * * sales * * *.' "

This Court has held that the measure of a privilege tax may be the selling price of the product involved. As stated in **Western Live Stock v. Bureau of Revenue**, 303 U.S. 250 (1937):

> "Selling price, taken as a measure of value whose accuracy appellants do not challenge, is for all practical purposes a convenient means of arriving at an equitable measure of the burden which may be imposed on an admittedly taxable subject matter. * * *" 303 U.S. at 258.

The fact that the value which the gross receipts measure is, in large part, the result of activity outside the territorial limits of the taxing jurisdiction does not

mean the gross receipts are not fairly related to the activity within the jurisdiction. There is no constitutional objection to resorting to extraterritorial elements in determining the measure of a tax. **General Motors Corp. v. Washington**, 377 U.S. 436 (1964); **Wisconsin v. J. C. Penney Co.**, 311 U.S. 435 (1940); **Great Atlantic & Pacific Tea Co. v. Grosjean**, 301 U.S. 411 (1937).

In **General Motors**, this Court sustained a state tax imposed upon the privilege of engaging in business activities within the state, measured by General Motors' gross receipts from wholesale sales of motor vehicles, parts and accessories delivered in Washington. The fact that the gross receipts in large part represented extensive out-of-state manufacturing and operational activities did not mean that the gross receipts were not fairly related to the act of selling.

As stated by this Court in **Wisconsin v. J. C. Penney Co., supra**, 311 U.S. at 445:

> "The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction."

General Motors, supra, was followed by **Standard Pressed Steel v. Washington Department of Revenue**, 419 U.S. 560 (1975). There the state of Washington sought to tax the gross income from sales made by Standard Pressed Steel's one employee in Washington who, operating out of his home, made periodic contacts with the Boeing Company in Washington. The Washington courts affirmed the tax and this Court, placing substantial reliance on **General Motors**,

unanimously agreed. As to the apportionment issue and the fact that the gross income was subjected to Washington's business and occupation tax, this Court concluded that the tax is ' "apportioned exactly to the activities taxed," ' all of which are intrastate.

In the **Department of Revenue of Washington v. Association of Washington Stevedoring Companies,** 435 U.S. 734 (1978), this Court held:

> "When a general business tax levies only on the value of services performed within the State, the tax is properly apportioned and multiple burdens logically cannot occur. * * *" 435 U.S. at 746.

In accordance with appellant's reliance upon **Maryland v. Louisiana,** 451 U.S. 725, 755, n.27 (1981), that "a tax on interstate commerce must be reasonably apportioned to the value of the activities occurring within the State" is the fact that in this appeal the subject of the tax, that of making wholesale sales, is measured by the gross income derived therefrom. Accordingly, the tax being imposed upon a wholly in-State activity is properly apportioned under the rationale of **Department of Revenue of Washington, supra,** and **Maryland v. Louisiana, supra,** for the reason that the tax is imposed upon an activity "performed" or "occurring" within West Virginia.

This Court tacitly recognized the measure of a gross receipts tax, **i.e.,** gross income, as being fairly apportioned in **Moorman Manufacturing Company v. Bair,** 98 S. Ct. 2340 (1978), in upholding a single-factor destination sales formula for the apportionment of net income of an interstate business engaged in the manufacture and sale of feed and livestock. Con-

trasting such single-factor sales formula for taxation with the gross receipts tax involved in **Standard Pressed Steel, supra,** and **General Motors Corp., supra,** the Court stated:

> "Finally, it would be an exercise in formalism to declare appellant's income tax assessment unconstitutional based on speculative concerns with multiple taxation. For it is evident that appellant would have had no basis for complaint if, instead of an income tax, Iowa had imposed a more burdensome gross receipts tax on the gross-receipts from sales to Iowa customers. In Standard Pressed Steel Co. v. Washington Revenue Dept. 419 U S 560, 95 S Ct 706, 42 L Ed 2d 719, the Court sustained a tax on the entire gross receipts from sales made by the taxpayer into Washington State. Because receipts from sales made to States other than Washington were not included in Standard Pressed Steel's taxable gross receipts, the Court concluded that the tax was ' "apportioned exactly to the activities taxed." ' Id., at 564, 42 L Ed 2d 719, 95 S Ct at 706.
>
> "In this case appellant's actual income tax obligation was the rough equivalent of a 1% tax on the entire gross receipts from its Iowa sales. Thus, the actual burden on interstate commerce would have been the same had Iowa imposed a plainly valid gross receipts tax instead of the challenged income tax. Of more significance, the gross receipts tax

sustained in Standard Pressed Steel and General Motors Corp. v. Washington, 377 U S 436, 12 L Ed 2d 430, 84 S Ct 1564, is inherently more burdensome than the Iowa income tax. It applies whether or not the interstate concern is profitable and its imposition may make the difference between profit and loss. In contrast, the income tax is only imposed on enterprises showing a profit and the tax obligation is not heavy unless the profits are high." 437 U.S. 280.

Respecting the testimony of the economists alluded to by appellant in its Jurisdictional Statement, it is of significance to note that Ms. Musgrave while finding fault with a gross receipts tax nevertheless testified that there was no single correct way of allocating tax base under such system of taxation. Specifically referring to the West Virginia business and occupation tax, Musgrave testified that it was not common to apportion such type of tax, but rather that sales (gross receipts) are commonly assigned to the jurisdiction in which the sale takes place.

Musgrave did conclude that the method of taxation and the measure of the tax is for the policymakers, the legislative and executive branches of government. As observed by the lower court, "that theory [the value-added tax] has been expressly rejected by the state's fiscal policy-formulators."

Thus, appellant's theory of the tax in question being unreasonably malapportioned and thus unconstitutional is without merit. The West Virginia business and occupation tax has its roots in the local transaction, and by its very nature carries its own proportionality.

II.

THE IMPOSITION OF THE WEST VIRGINIA BUSINESS AND OCCUPATION TAX UPON APPELLANT'S BUSINESS ACTIVITY OF MAKING WHOLESALE SALES OF NATURAL GAS IN WEST VIRGINIA DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE.

In its Jurisdictional Statement, appellant asserts that the tax in question discriminates against interstate commerce in three different ways. The first alleged basis of discrimination is the interplay between Sections 2, 2a, and 2c, of Chapter 11, Article 13, of the West Virginia Code of 1931, as amended. (A. at 68a through 75a.) Specifically, the fifth paragraph of Code 11-13-2 provides that a person subject to the natural resource production privilege tax provided by Code 11-13-2a is not also subject to the wholesale sales business tax provided by Code 11-13-2c. Appellant contends that since an out-of-State producer has to pay the wholesale sales tax under Code 11-13-2c, while the in-State producer does not, this is discrimination against interstate commerce that violates the Commerce Clause. Appellee submits that the tax in question is not discriminatory in this manner or in any other manner.

First, the standard announced by this Court in determining if a state tax violates the Commerce Clause for being discriminatory is: "No state may, consistent with the Commerce Clause, 'impose a tax which discriminates against interstate commerce * * * by providing a direct commercial advantage to local

business.' " **Boston Stock Exchange v. State Tax Commission,** 429 U. S. 318, 329 (1977). Further, when determining whether a state tax is discriminatory, the tax must be assessed in light of its actual effect and considered in conjunction with other provisions of a state's taxation scheme. **Maryland v. Louisiana,** 451 U.S. 725 (1981). The lower court correctly recognized this principle by quoting **Halliburton Oil Well Cementing Co. v. Reily,** 373 U.S. 64, (1963): "proper analysis must take 'the whole scheme of taxation into account,' " and "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." (A. at 30a.)

In conformity with cases decided by this Court, a state's taxation scheme passes constitutional muster if interstate and intrastate businesses are subject to essentially the same tax burden. That is, a state tax is constitutional as long as interstate business and intrastate businesses are subject to essentially the same tax burden on the same local activities under the state's comprehensive scheme of taxation. It is not necessary that they both pay under any one particular tax or classification.

Accordingly, the fact that a producer of natural gas subject to the West Virginia business and occupation tax on production of natural resources (Code 11-13-2a)[1] is not subject to the tax on wholesale

---

[1]Appellant, in its Jurisdictional Statement, refers to Code 11-13-2a as a severance tax. In fact, it is really not a true severance tax, but rather a much broader tax on the privilege " 'of severing, extracting, reducing to possession and producing for sale, profit, or commercial use any natural resource products.' " (A. at 71a.)

sales does not amount to discrimination against interstate commerce. A West Virginia producer of natural gas is exempt from the wholesale sales tax, imposed at the rate of .27 percent, only if he has paid the tax on production at the rather substantial rate of 8.63 percent. Given these different tax rates, it cannot be said that an in-State producer who sells its gas in West Virginia is going untaxed while an out-of-State producer is carrying an unfair share of the tax burden. The Legislature saw fit to tax the production of natural resources at a higher rate than other business activities, and then allow the producer to sell the resource at the wholesale level tax-free. If the in-State producer sells West Virginia produced natural gas at the retail level, or any other person sells West Virginia produced gas at wholesale, such sales are subject to taxation. Thus, the only time that a wholesale sale of West Virginia produced gas goes tax-free is when it is sold by a producer who has paid tax on the production privilege at a much higher rate. This is an entirely reasonable system of taxation of the production and sale of natural gas in West Virginia that does not discriminate against interstate commerce.

This Court has upheld similar systems of state taxation. In **Caskey Baking Co. v. Virginia,** 13 U.S. 117 (1941), the tax complained of there was an annual license tax of $100 imposed for each vehicle used in the business of peddling goods or merchandise. The license tax did not apply to local manufacturers that paid a tax on their capital or local distributors having a fixed place of business in the state who paid a state tax on their purchases. Thus, the practical effect of the statute was that the vehicles of local manufacturers and distributors were exempt from the license tax, while the vehicles of vendors domiciled out-of-state

were subject to the tax. The appellant in the case was a West Virginia bakery that sent its trucks into Virginia to sell bakery goods.

This Court held the license tax to be constitutional, upon a finding that the tax in question was but one portion of a reasonable comprehensive scheme of taxation. Also, the Court held that while local manufacturers and distributors were not subject to the tax on their vehicles, they paid other state taxes which the state deemed sufficient to cover all of their activities, including the vending of goods. The Court in its decision also noted if the license tax was not allowed, the out-of-state vendors would be the only vendors in Virginia to escape some form of taxation.

Likewise, in the case of **Alaska v. Arctic Maid, 366 U.S. 199 (1961)**, the tax involved was a four percent occupation tax on freezer ships processing fish taken from Alaskan waters. The taxpayer there used freezer ships for the taking and preservation of salmon along Alaska's shores. After freezing the fish, the freezer ship would return to the state of Washington where the fish were canned. The taxpayer claimed discrimination, since fish that were caught and canned in Alaska were not subject to the four percent tax. This Court looked at Alaska's entire scheme of taxation and upheld the tax, saying:

> "It is claimed that there was no tax on salmon caught and frozen in Alaska and destined for canning in Alaska and that therefore this law is discriminatory against freezer ships. Alaskan canneries, however, paid a six-percent tax on the value of salmon obtained for canning; and local fish processors, which sell to the fresh-frozen

consumer market, paid a one-percent tax. The freezer ships do not compete with those who freeze fish for the retail market. The freezer ships take their catches south for canning. Their competitors are the Alaskan canners; and we know from the record that fish canned locally usually are not frozen. When we look at the tax laid on local canners and those laid on 'freezer ships,' there is no discrimination in favor of the former and against the latter. For no matter how the tax on 'freezer ships' is computed, it did not exceed the six-percent tax on the local canners. * * * If there is a difference between the taxes imposed on these freezer ships and the taxes imposed on their competitors, they are not so 'palpably disproportionate' (International Harvester Co. v. Evatt, 329 US 416, 422, 91 L ed 390, 395, 67 S Ct 435) as to run afoul of the Commerce Clause. No 'iron rule of equality' between taxes laid by a State on different types of business is necessary." (Citations omitted.) **Alaska v. Arctic Maid, supra,** at 204.

See also, Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932).

Accordingly, although in-State producers of natural gas do not pay under the wholesale sales classification of the business and occupation tax, they nevertheless must pay a tax, at a much higher rate, on the entire production privilege which includes everything from severance of the natural resource to producing it for sale or commercial use. Given the tax

burden placed on the in-State producer of natural gas, it cannot be said that appellant pays a disproportionate amount of tax on its in-State sales.

Appellant's contention regarding the second type of discrimination is likewise without merit. The basis of such claim is that for the first fifteen months of the assessment period (January 1, 1970 through March 31, 1971), the then effective provisions of West Virginia Code 11-13-2d allowed a deduction from a public utility's gross receipts equal to the amount of tax paid under Code 11-13-2a. on the production of natural gas. (A. at 77a.) Appellant contends that for the first nine months of 1970, its predecessor, United Fuel Gas Company, was a public utility and was not entitled to the same deduction since it was an out-of-State producer of natural gas.

First, the issue of possible discrimination under former Code 11-13-2d, as it applied to retail sales of natural gas by public utilities need not be decided by this Court. The assessment and the decision below dealt only with the taxation of appellant's wholesale sales in West Virginia and not its or its predecessor's sales as a public utility. (A. at 41a.) Thus, this Court need not determine the constitutionality of the tax imposed by Code 11-13-2d, since this tax was not part of the assessment against the appellant.

Even if the issue was before the Court, appellant could show no dollar and cents discrimination against interstate commerce under West Virginia's total scheme of taxation. Simply because West Virginia allowed public utilities to deduct the tax paid at the higher production rate from their gross receipts does not amount to palpable discrimination.

This is true even though a public utility may have paid similar production taxes outside of the state. A state is not required to give a credit against its own taxes for taxes paid to another state. "A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere." **Henneford v. Silas Mason Co.**, 300 U.S. 577, at 587 (1937).

Finally, appellant asserts that a third manner of discrimination results from the treatment given manufacturers under Chapter 11, Article 13, Section 2b, of the West Virginia Code of 1931, as amended. (A. at 73a.) Appellant contends that because a person that manufactures a product partially in-state and partially out-of-state is allowed to apportion his gross receipts between the two states; so should a wholesaler engaged in interstate commerce.

The reasons for the differences in the statute are obvious. Under Code 11-13-2b, the activity being taxed is manufacturing. If part of that activity occurs out-of-State, obviously West Virginia can tax only that part of manufacturing occurring in the State. That is what the apportionment formula does.

On the other hand, Code 11-13-2c taxes the activity of selling at wholesale in the State. It is the activity of selling a product, not the producing or manufacturing of that product that is the subject of the tax. In appellant's case, while the product may have been produced elsewhere, the selling activity takes place wholly in West Virginia. The tax, as shown in the argument above, is apportioned exactly to the activity taxed, all of which occurs in West Virginia.

The manufacture of a product and the selling of a product are two different types of activities. The West Virginia Business and Occupation tax recognizes the differences between the two activities and classifies them accordingly. The proper classification of different activities under a tax statute is not discrimination. **Caskey Baking Co. v. Virginia, supra,** at 121.

CONCLUSION

Counsel for the appellee, Herschel H. Rose III, Tax Commissioner of the State of West Virginia, respectfully submits that the lower court decision is clearly correct; that this appeal does not present a substantial federal question; that the judgment below rests on an adequate nonfederal basis; and, that this Court should dismiss this appeal and affirm the decision below.

Respectfully submitted,

ROBERT P. HOWELL
Assistant Attorney General for the State of West Virginia
State Capitol, Room W-435
Charleston, West Virginia 25305

(304) 348-2522

Counsel for Appellee,
Herschel H. Rose III

Of Counsel

CHAUNCEY H. BROWNING
Attorney General

JACK C. McCLUNG
Deputy Attorney General

E. WAYNE BASCONI
Assistant Attorney General

State Capitol
Charleston, West Virginia 25305